UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLWAYS EAST TRANSPORTATION, INC.

and **Cases 03-CA-128669**
03-CA-133846

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 445

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

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I. PRELIMINARY STATEMENT

This case was heard before Administrative Law Judge Susan A. Flynn, pursuant to a Consolidated Complaint that issued on September 30, 2014, alleging that, Allways East Transportation, Inc. (Respondent), successor employer to Durham School Services (Durham), violated Section 8(a)(1) and (5) of the Act by (1) failing to recognize and bargain with International Brotherhood of Teamsters, Local 445 (the Union), (2) unilaterally terminating employee Sherry Siebert, (3) unilaterally changing wage rates and (4) refusing to provide information. (GCX-1(e) ¶ VII IX, X, XI, and XII).[1] At the hearing, the ALJ granted the General Counsel's motion to amend the Consolidated Complaint to include, as part of the remedy for the unfair labor practices alleged in paragraphs XI(a) through (d), reimbursement of all search for work and work-related expenses incurred by Sherry Siebert during any given quarter or the overall back pay period. (Tr. 150-151, 154).

The ALJ recommended dismissal of all allegations. The General Counsel excepts to certain findings of the ALJ, most notably, her finding that Respondent was not a successor employer to Durham despite the ample case law to the contrary, and her finding that Respondent's Dutchess County[2] facility is not an appropriate unit despite Respondent's failure to rebut the presumption that a single-facility unit is appropriate. The General Counsel urges the Board to reverse the ALJ's findings.

[1] References to the Administrative Law Judge's Decision are cited as "(ALJD __:__)", followed by the appropriate page number(s) and line number(s). References to General Counsel Exhibit are cited as "(GCX-__)" and reference to Respondent Exhibits are cited as "(RX-__)." References to the official transcript of the hearing are cited as "(Tr. __)," followed by the appropriate page number(s).

[2] The Company has since moved its Wappingers Falls facility to Fishkill, New York, a neighboring city that is similarly distant from Yonkers. To reduce confusion, the Wappingers Falls facility and the Fishkill facility will both be hereinafter referred to as the Dutchess County facility. (Tr. 653).

II. FACTS

a. Predecessor Durham Serviced the Dutchess County Contract

Before April 22, 2014,[3] predecessor employer Durham provided school bus transportation services for preschool children with special needs in and around Dutchess County, New York pursuant to a contract with the Dutchess County Department of Health ("Dutchess County"). (GCX-3(a), Tr. 226-227). Durham employed approximately 185 bus drivers and monitors, all of whom were represented by the Union (Unit employees). (GCX-4; GCX-7; Tr. 225). The Union was certified as the exclusive bargaining representative of the Unit employees on October 28, 2009, following a Board election (03-RC-011921). In addition to the Dutchess County contract, Durham's employees also provided bus services for other school districts near Poughkeepsie, New York. (Tr. 226-227). The parties' first collective-bargaining agreement was effective from March 2010 through September 2012. The parties' most recent collective-bargaining agreement was effective September 20, 2012 through August 31, 2018. (GCX-7). Durham's operations in Dutchess County were based at a facility at 710 Tucker Drive, Poughkeepsie. (Tr. 223). Durham also rented a farm field in Red Hook where buses were sometimes parked, but no other activities were performed there. (Tr. 224-225).

After experiencing problems with Durham's performance of the contract, Dutchess County notified Durham in a letter dated February 28 that it would be terminating the contract. (RX-18). The same day, Dutchess County awarded the former Durham contract to Respondent, a bus company based in the city of Yonkers, in Westchester County, New York. (RX-21; Tr. 628-629). They executed that contract on May 7, which was after Respondent began operation of the contract on April 22. (GCX-5; Tr. 628-629).

[3] All dates are 2014 unless otherwise noted.

b. Respondent Acquires the Dutchess County Contract But Rejects the Union's Demand for Recognition

In early March, the Union learned that Dutchess County terminated its contract with Durham and awarded the work to Respondent. (Tr. 229-231). On March 10, Lori Polesel, the Union's Business Agent, and Adrian Huff, the Union's Secretary-Treasurer and principal officer, called Marlaina Koller, Respondent's Vice President, to request a meeting. (Tr. 232). Koller told Huff and Polesel that she was busy, but suggested they provide possible meeting dates. (Tr. 232). Polesel responded via e-mail on the same date with four potential meeting dates, stating that the Union "represents the drivers and monitors of Durham School Services that currently do this work [the Dutchess County pre-school transportation] and we are looking forward to meeting with you." (GCX-9(a)). Koller never responded. (Tr. 232-233). By letter dated April 16, the Union formally requested recognition from Respondent, but never received a response to this request. Indeed, Respondent has not communicated with the Union since assuming control of the operations. (GCX-9(b); Tr. 233-234). On May 14, Union Secretary-Treasurer Huff and Union business representatives visited Respondent's facility and asked to speak to Koller. (Tr. 234-235). They were told that she was not present, but that their message would be conveyed to her. (Tr. 235). Koller never responded. (Tr. 235-236).

Durham stopped providing transportation services to Dutchess County in mid-April during the Spring break. (Tr. 341). After break, Respondent commenced the Dutchess County operations on Tuesday, April 22. (Tr. 628-629). On July 18, after learning that Respondent had terminated Sherry Siebert, a Unit employee, Polesel contacted Koller again via email, requesting information about any terminated employees and offering to meet and discuss. (GCX-9(c); Tr. 234, 237). Again, Koller did not respond. (Tr. 237). Respondent discharged Siebert without notifying the Union or bargaining with the Union. (Tr. 236-237).

On July 18, the Union sent an email requesting information about the names of all terminated Durham employees but received no response. (Tr. 234, 237).

c. <u>Respondent Hires Durham's Workforce</u>

After it was awarded the Dutchess County contract, Respondent placed job advertisements in the Poughkeepsie Journal, a local newspaper, as well as on local radio stations. (GCX-8(a); GCX-8(b); Tr. 634-635). On March 8-9 and March 15-16, Respondent participated in a job fair at the Marriott Hotel in Poughkeepsie to recruit drivers and monitors. (GCX-8(a); GCX-8(b); Tr. 343-344). A number of people attended the job fair, and at least 80 of those people completed employment applications for positions at Respondent's new facility, which was to perform work on the Dutchess County contract. (Tr. 638). Most of the applicants at the job fair were former Durham employees, and Respondent hired, at the recommendation of Dutchess County and to the extent possible, the former Durham drivers and monitors to minimize any disruption for the special education students and their parents. (Tr. 642-644). Payroll records for the pay period ending April 24 show that Respondent eventually hired at least 80 people, and that 58 of the 80 employees previously worked for Durham. (GCX-16). Therefore former Durham employees made up approximately 72.5 percent of Respondent's workforce in Wappingers Falls. (GCX-4; GCX-6(a); GCX-6(b); GCX-16). Respondent specifically sought applicants who already knew the children on the Dutchess County routes and were familiar with the area so the children would have familiar drivers. (Tr. 643-644). As a result, a majority of the applicants Respondent hired were former Durham employees who had previously driven on the Dutchess County routes. (GCX-17).

After the job fair, Marlaina Koller and her mother, Respondent's President Judith Koller, decided which applicants would be hired. (Tr. 816). Respondent did not offer Durham employees the ability to carry their seniority, but discussed wages with them. (Tr. 640-641).

Respondent acknowledges that the Durham drivers it retained largely kept their former runs, and that Dutchess County encouraged this. (Tr. 644). Respondent kept former Durham drivers on the same runs they had previously driven, and when requested, Respondent kept preexisting driver/monitor teams together. (Tr. 346, 649).[4]

In about April when Durham lost its contract, it did not lay off employees. Instead, many Durham employees resigned when they learned that they could work for Respondent, so they could stay with the same children, on the same routes, and in the same towns. (Tr. 346).

d. <u>Respondent Begins Performance of the Dutchess County Contract</u>

Respondent's original facility is in Yonkers, New York where it employs approximately 200 drivers and monitors to service contracts in that vicinity. (Tr. 630). Yonkers is about 56 miles from Respondent's facility in Dutchess County. (Tr. 633). When Respondent obtained the contract with Dutchess County, it leased a terminal at 228 Myers Corners Road, Wappingers Falls, New York, about eight miles from Durham's facility in Poughkeepsie, and used its own vehicle fleet rather than acquiring Durham's. (Tr. 651-652, 822). The former Durham drivers and monitors performing the Dutchess County work (the "Dutchess County unit") are based at Respondent's Dutchess County facility. As of April, drivers at Yonkers were paid $16.00 to $19.00 per hour and monitors were paid $14.00 to $16.00. (Tr. 632-633). As of April, Respondent's drivers in Dutchess County earned $14.00 to $16.00 per hour and the monitors

[4] Employee Janet Hajba stated that when applying she had asked, "'Would I be able to keep my same run," because I wanted the same run. I didn't want to be, you know, meeting other children and other parents. I know my kids. I wanted to stay with my own kids." The response was, "Oh, most definitely, you would keep your same run. The same monitor that you have, you would be keeping; which I was happy about that." (Tr. 346).

earned $10.00 to $12.00. (GCX-17). Former Durham employees working at Respondent's Wappingers Falls facility almost entirely retained their same job titles, routes, vehicles, park out privileges, passengers (excepting those who graduated or moved), and the same approximate number of passengers as they had at Durham. (Tr. 353, 355, 528, 540, 542). Driver Janet Hajba testified that her bus had the same layout and that the car seats were the same. (Tr. 353). Hajba also testified that she had the same "park out" arrangement, which allowed her to take her bus home, and an EZ Pass, like she had at Durham. (Tr. 355, 365).[5] Driver Lavanda Cave testified that his job title was the same, he had the same bus, and he had the same runs with the same children. (Tr. 528, 540, 542). Monitor Heidi Rodegerdts testified that her bus was the same, her runs were the same, and park out privileges were the same (Tr. 431, 443). At both Durham and Respondent's Dutchess operations, drivers and monitors work in pairs. (Tr. 346, 356). Drivers drive and monitors assist children on and off the bus, watch them, and play games with them. (Tr. 339). Employees and supervisors testified to the importance of familiar relationships between the children and employees, especially for special needs children. (Tr. 337-338, 643-644).

e. <u>Respondent's Dutchess County Operations Are Directed Locally and Operate Separately from its Yonkers Facility</u>

Respondent employs Aldo Leon and Carlos Rivera as dispatchers in Dutchess County. Leon and Rivera assign the drivers and monitors their runs. (Tr. 308). The dispatchers' principal function is "to make sure everything runs smoothly." (GCX-10; Tr. 308). Although Leon and Rivera testified that they are dispatchers *and* drivers rather than just dispatchers, this distinction is immaterial because management employees, including Respondent's President, Judy Koller, also drive from time to time. (Tr. 286, 474, 680). Before becoming dispatchers at the Dutchess

[5] Hajba refers to this arrangement as a "home bus" here, but she later explains that a home bus is the same as a park out. (Tr. 379).

County location, Leon and Rivera were drivers at the Yonkers location. (Tr. 282-283, 471). Vice President Marlaina Koller acknowledged that Rivera and Leon were promoted to the dispatcher position when they transferred to Dutchess County—it was not a lateral move. (Tr. 665-666). Their promotion to the dispatcher position included relocation to Dutchess County, a three-dollar-per-hour pay raise and an upgrade from part-time to full-time status. (Tr. 283, 665-666). As part of their duties on behalf of Respondent, Leon and Rivera communicate with parents and county officials, manage any delays in school start time, and manage emergency situations, including accidents. (Tr. 288). Employees consider the dispatchers their bosses. (Tr. 546, 604, 1013).

Leon and Rivera hand out checks to employees on bi-weekly paydays at the Dutchess County location. (Tr. 293, 362). Employees also contact Leon or Rivera when they are running late, when they need to request time off or coverage for their runs, or when delays in their runs have occurred; Leon and Rivera record all time off and run coverage on a blackboard located at the Dutchess County location. (Tr. 298, 357-362, 446).[6] Employees report to Leon and Rivera when a child is absent or a parent is not present to receive a child. (Tr. 444). There is de minimus, if any, reporting by any Dutchess employee to the Yonkers facility. (Tr. 352, 363, 448).[7] For example, one employee testified that she did not even know the names of any dispatchers in Yonkers, and that she had only spoken to Marlaina Koller on two occasions, one of which was at the job fair. (Tr. 363, 451).

For a short time after it first began performing work under the Dutchess County contract, Respondent used a small number of Yonkers drivers and monitors to assist at Dutchess County;

[6] When asked about arranging coverage for runs, Leon testified, "Sometimes, like I said before, there is one day that a driver might be calling in sick….we always look for the driver who is like more familiar with the site…location…places…Yes[?] Boom, there you go. Take it." (Tr. 310).

[7] Dutchess employee witness testified that she was never told she might have to drive in the Yonkers area and even stated that she would not do so. (Tr. 352, 364).

8-10 were shuttled from Yonkers. (Tr. 834). No employees assigned to Dutchess County have ever been sent to Yonkers. (Tr. 301). In fact, the employees who testified stated that they had never been inside the Yonkers facility. (Tr. 447). Although all major vehicle repairs took place there, Respondent's Fleet Manager Frank Ortiz testified that its practice was to have a Yonkers employee bring up a replacement bus to the Dutchess County employee and return to Yonkers with the bus needing repair. (Tr. 909).

f. <u>Respondent Terminated Driver Sherry Siebert without Bargaining with the Union</u>

Sherry Siebert worked for Durham as a bus driver during the 2013-2014 school year, she drove on a Dutchess County BOCES run [Board of Cooperative Educational Services]. (Tr. 601). She had been working at Durham for approximately ten years. (Tr. 616). When Dutchess County terminated its contract with Durham and awarded that contract to Respondent, Siebert decided to "follow her runs." (Tr. 602). Meaning she resigned from Durham and was subsequently hired for a bus driver position with Respondent. (Tr. 602-603). However, Siebert only worked for Respondent for six days. (Tr. 603). On May 1, Siebert reported to Respondent's Dutchess County facility at 6:30 a.m. (Tr. 603). She picked up her monitor and safely delivered children to Hyde Park Nursery School. (Tr. 603). She returned to Respondent's facility and Aldo Leon, whom Siebert considered to be her boss, offered her a midday run to make extra money. (Tr. 603-604). She accepted the run reluctantly because, as she told Leon, she was not entirely familiar with the area in which the children on that run lived. (Tr. 604). She was given a "run sheet," which indicates where the children are located and gives driving directions to their respective houses. (Tr. 604). Because of the inaccuracies of the run sheet however, Siebert was only able to pick up roughly half of the students on that midday run. (Tr. 605). She returned to Respondent's facility and delivered all of the children on time during her afternoon run. On the

way back, an unknown object struck and shattered the rear window of the bus. (Tr. 605-606). She called Leon immediately to report the incident and returned to Respondent's facility. (Tr. 606). As during her employment at Durham, Siebert had "park out" privileges, which means that she was allowed to drive her bus home after work, so she was given a van to take home while the bus window was being repaired. (Tr. 607). Shortly after arriving at her apartment, she received a call from Leon, instructing her to meet him outside her apartment to give him the keys to the van. (Tr. 608). When she walked outside, she saw Leon with Rivera, and Leon instructed her that they had to take her van back to Respondent's facility. (Tr. 608). She then asked whether she was fired, but she was not given a response. (Tr. 608-609). She never received any notification of her termination, in writing or otherwise, but she never worked another day for Respondent. (Tr. 609). The Union learned of Siebert's termination from some of Respondent's other employees, and eventually, Siebert herself. (Tr. 237). Respondent never contacted the Union about Siebert's termination and it never made any attempt to bargain over her termination. (Tr. 237). Respondent acknowledged that it has other forms of discipline available short of termination. (Tr. 673-674). Respondent did not assert at hearing that it was required to terminate Siebert due to any contractual or legal obligations with Dutchess County or New York State.

III. THE ALJ ERRED IN FAILING TO FIND THERE IS SUBSTANTIAL CONTINUITY BETWEEN THE OPERATIONS OF DURHAM AND RESPONDENT

a. The ALJ Erred in Applying the *Fall River Dyeing* Analysis (Exceptions 21, 31, 52, 53)

The ALJ erred in her application of the *Fall River Dyeing* case concerning the existence of substantial continuity between the operations of Durham School Services and Respondent. (ALJD 7:1-9, 8:26-27, 13:10-11, 13:13-15). As a result, the ALJ incorrectly found that Respondent is not a successor to Durham, and thus, that it had no obligation to recognize and

bargain with the Union. The ALJ found that there was no substantial continuity of operations between Durham and Respondent by failing to properly consider the totality of the circumstances and failing to consider those circumstances from the employees' perspective. The "substantial continuity" test hinges on the totality of the circumstances, including but not limited to, whether there is a continuity of the business operation, products or services provided, plant workforce, working conditions, and supervision. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The Board's focus on these factors is from the employees' perspective, i.e., considering whether they would view their job as essentially unchanged despite the change in business enterprises. *Fall River*, 482 U.S. at 43 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)); *Vermont Foundry Co.*, 292 NLRB 1003, 1008 (1989) (calling this "the core question"); *Derby Refining Co.*, 292 NLRB 1015 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990). "If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of 8(a)(5) is activated. *Fall River Dyeing*, 482 U.S. at 41. In these circumstances the employer is taking advantage of its predecessor's trained work force. *Id*.

As the Board noted in another case, continuity of operations is found even if there are some operational differences between the predecessor and successor because, as is the case here, the work is the same.

> While there are some differences in the way Montauk [successor] operates and also differences in the wages and terms and conditions of employment between the two companies [predecessor and successor], it is self-evident that both are involved in the same employing industry and that the employees essentially do the same work. They drive schoolbuses.
>
> *Montauk Bus Company*, 324 NLRB 1128, 1134-35 (1997).

i. First Prong of *Fall River Dyeing*: The Business of both Durham and Respondent is Essentially the Same (Exceptions 10, 18, 31)

The business of both Durham and Respondent is the same and the ALJ's finding to the contrary is erroneous. (ALJD 5:9, 7:1, 7:2-9). The ALJ found that Respondent only took over the special needs transportation portion of Durham's contract with Dutchess County. The ALJ erred in relying on that fact to determine no substantial continuity of operations between the two companies. "It is well established that bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a union-represented operation is subject to a sale or transfer." *Bronx Health Plan*, 326 NLRB 810, 812 (1998), *enforced* 203 F.3d 51 (D.C. Cir. 1999) (unpublished table decision). *See also NLRB v. DeBartelo*, 241 F.3d 207, 211-13(2d Cir. 2001) (diminution of a successor's unit from 35 to 4 employees does not defeat successorship finding); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1064 (2001) (partial takeover of predecessor employer's operations did not preclude successorship finding); *Louis Pappas' Restaurant*, 275 NLRB 1519, 1519-20 (1985) (citing *Stewart Granite Enterprises*, 255 NLRB 569 (1981)). Thus, the fact that Respondent took over only a portion of the bargaining unit work previously performed by Durham does not defeat its obligation to recognize and bargain with the Union.

Bronx Health Plan is illustrative of the extent to which the unit may be altered without eliminating successorship obligations. There, the predecessor employed workers in hundreds of job classifications in the recognized unit. The successor hired a tiny fraction, .05 percent, of the predecessor's bargaining unit employees, 16 out of 3500, who were scattered among those many job classifications. The union sought to bargain over the 16 employees in a clerical unit. The Board found successorship because, among other things, all of the successor's unit employees had been employees of the predecessor. In short, in *Bronx Health Plan*, the successor unit no

longer contained the vast preponderance of the predecessor's bargaining unit jobs and employee complement, yet a duty to bargain remained because the Board found continuity in the nature of the enterprise and the work force. See also *NLRB v. DeBartelo*, 241 F.3d 207,211-13 (2d Cir. 2001); *Van Lear*, 336 NLRB at 1064; *Louis Pappas' Rest*., 275 NLRB 1519, 1519-20 (1985) (citing *Stewart Granite Enter*., 255 NLRB 569 (1981)).

Since Respondent assumed the contract with Dutchess County, it has substantially continued Durham's operations. Respondent provides the same services, bus transportation to preschool and special education students, in the same manner as Durham. To maintain continuity for the students, Respondent utilizes the same routes and assigns the same drivers and monitors to those routes as Durham did. (Tr. 649-651, 720). Indeed, by the nature of the job and the requirements of the contract with Dutchess, many aspects of the job are immutable. Both before and after Respondent assumed operations, the children lived in the same houses, went to the same schools, those schools opened and closed at the same times, and the road and traffic conditions were the same. If any of these factors changed, such changes would have occurred regardless of which bus company provided services.

ii. <u>Second Prong of *Fall River Dyeing*: Respondent's Employees are Doing the Same Jobs in Essentially the Same Working Conditions (Exceptions 12, 15, 19, 21, 24, 29)</u>

Respondent's employees are doing the same jobs under the same working conditions as they did at Durham, and the ALJ's finding to the contrary is erroneous. (ALJD 5:23-24, 7:3-4, 7:1-9, 7:23-24, 8:15-17). In finding that the terms and conditions of employment changed, the ALJ failed to weigh similarities in working hours, routes, vehicles, job titles, passengers, and the approximate number of passengers. She also failed to consider these factors from the employees' perspective, i.e., whether they would view their work as essentially unchanged despite the

change in business enterprises. *Fall River*, 482 U.S. at 43 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)). Instead, the ALJ focused on negligible differences between the two companies and used them to reach her erroneous conclusion that Respondent was not a successor to Durham.

The record shows that former Durham employees working at Respondent's Dutchess County facility almost entirely retained their same job titles, routes, vehicles, park out privileges, passengers (excepting those who graduated or moved), and approximate number of passengers as they had at Durham. (Tr. 353, 355, 528, 540, 542). Driver Janet Hajba testified that she had the same route, the same children, her bus had the same layout, and the car seats were the same. (Tr. 340, 346, 353). Indeed, she did not need to do a "dry run" when she started working for Respondent because she already knew the route. (Tr. 355). Hajba also testified that she had the same "park out" arrangement, which allowed her to take her bus home, and an EZ Pass, like she had at Durham. (Tr. 355, 365).[8] Driver Lavanda Cave similarly testified that he had the same job title, the same bus, and the same runs, with the same children. (Tr. 528, 540, 542). Monitor Heidi Rodegerdts testified to the same effect-she had the same bus, runs and park out privileges.(Tr. 431, 443). Other continuing terms and conditions of employment include that drivers and monitors work in pairs, with drivers driving and monitors assisting children on and off the bus, watching them, and playing games with them. (Tr. 339, 346, 356). Employees and supervisors testified to the importance of familiar relationships between the children and employees, especially for special needs children. (Tr. 337-338, 643-644). Respondent's employees are performing the same jobs that they performed as Durham's employees. Respondent's employees in Dutchess County still service Dutchess nearly exclusively, as they did under Durham.

[8] Hajba refers to this arrangement as a "home bus" here, but she later explains that a home bus is the same as a park out. (Tr. 379).

The ALJ appears to rely heavily on the fact that employees have different supervisors at Respondent, but this factor alone is insufficient to defeat a successorship finding. In fact, in *NLRB v. Burns International Security Services, Inc.*, the respondent hired its own supervisors and the Supreme Court nevertheless concluded that Burns was a successor employer. 406 U.S. 272 (1972). Similarly, relocating employees to another terminal eight miles away does not alter the fundamental nature of the operations. *Montauk Bus Co.*, 324 NLRB 1128, 1135 (1997) (terminal relocation did not defeat successorship finding).

The key is that Respondent's employees saw their jobs as essentially the same as when they were employed by Durham. Although Respondent purchased a new fleet of vehicles and relocated the reporting location in Dutchess County, eight miles from where it was previously located, the Board has held that substantial continuity is not defeated by renovations and upgrades to existing facilities or infrastructure where, as here, the essential character of the operation remains unchanged. *Continental Inn*, 186 NLRB 248 (1970), enfd. sub nom. *NLRB v. Interstate 65 Corp.*, 453 F.2d 269, 271-74 (6th Cir. 1971) (affirming Board's successorship finding because employer's renovations could increase business, but would not alter nature of employing industry); *Croley Coal Corp*, 269 NLRB 182 (1984), enfd. sub nom. *NLRB v. South Harlan Coal, Inc.*, 844 F.2d 380, 383-84 (6th Cir. 1988) (finding substantial continuity in successor liability case despite successor's equipment changes); *Lemay Caring Center*, 280 NLRB 60, 72-73 (1986), enfd. mem. sub nom. *Dasal Caring Centers v. NLRB*, 815 F.2d 711 (8th Cir. 1987) (finding continuity of employer nursing home facility despite building renovations, name change, a few administrative changes and designation and resumption of kitchen and dining operations); *Foodway of El Paso*, 201 NLRB 933, 934, 937 (1973), enfd. 496 F.2d 117 (5th Cir. 1974) (affirming ALJ's finding of successorship despite renovations to store, including

repainting, shelving, reorganizing and adding new merchandise, installing new loading system, installing new equipment, increasing hours of business, and changing store sign and name). No such drastic changes are present here. A sufficiently updated fleet of vehicles was a requirement of the Dutchess County contract (GCX-5) and the reporting location was moved only about eight miles from Durham's facility in Poughkeepsie to Wappingers Falls.

There is no dispute that the Union timely requested recognition nor that Respondent employed almost 75 percent of Durham's former drivers and monitors in the same capacity. (GCX-4, GCX-6(a), GCX-6(b)). "[E]ven assuming there was some reason for confusion regarding the unit in which bargaining was demanded [in fact, there was none], it was the Respondent's obligation to seek clarification, which it did not do." *Trident Seafoods, Inc.*, 318 NLRB 738, 739 (1995) (citing *Hydrolines, Inc.*, 305 NLRB 416, 420 (1991). Consequently, Respondent is a legal *Burns* successor to Durham with regard to performance of the Dutchess County transportation contract (GCX-5) because there is a substantial continuity between the operations of Durham and Respondent and a majority of Respondent's workforce at Dutchess County consists of former Durham employees.

iii. Third Prong of *Fall River Dyeing*: Respondent has the Same Production Processes, Procedures, Products, and Customers as Durham (Exceptions 3, 20, 27, 30)

The ALJ erroneously concluded that Respondent's evidence on production processes, procedures, and products defeated a finding of substantial continuity. (ALJD 3:21-26, 7:5-6, 7:35-36, 8:19-24). Respondent has the same production process, procedures, and products, and basically the same body of customers. As discussed above, Respondent's employees viewed their jobs as remaining the same. Therefore, the ALJ wrongly found that the drivers' processes and procedures are materially different at Respondent; the drivers still drive buses and take students

to and from the same homes and schools, which are located in the same towns, as they did for Durham. The examples of supposed materially different processes and procedures found by the ALJ are either unsupported findings or inapposite to the proper analysis. (ALJD 7:37-45). One example used by the ALJ was that at Durham drivers and monitors met at the facility, while at Respondent they meet at each other's homes to start the day. (ALJD 7:37-38). This finding is unsupported by evidence that such practices changed for most or even many of the drivers and monitors. But more importantly, it is irrelevant because choosing to carpool to work or how to get to the bus in the morning is not a term or condition of employment set by either Respondent or Durham, but is simply an arrangement certain drivers and monitors made among themselves with no input from Respondent. The ALJ's other example of supposed different processes and procedures, that at Durham most buses were parked overnight at the facility while at Respondent most drivers take them home, is minimally relevant because it only concerns where empty buses are parked overnight and not during time when drivers are actually working. As witness testimony showed, employees' job titles, routes, vehicles, park out privileges, passengers, and approximate number of passengers remain unchanged. (Tr. 353, 355, 528, 540, 542). Likewise, the body of customers, children/families on their bus routes, are also the same, except for children who may have moved or graduated. Witnesses testified that they had the same bus runs with the same children. (Tr. 431, 443, 528, 540, 542). One witness even testified that his route had the same name. (Tr. 542). Thus, there is ample support in the record demonstrating substantial continuity between Durham's operations and Respondent's operations under the Dutchess County contract. As a result, the ALJ should have found that the drivers' processes and procedures at Respondent are not materially different than they were at Durham.

b. <u>The ALJ Erred in Failing to Find that Respondent *Intentionally* Hired the Predecessor's Employees (Exceptions 2, 4)</u>

The ALJ erred in failing to find that Respondent intended to hire Durham employees and desired a seamless transition of bus services. Although the ALJ found that Dutchess County recommended that Respondent hire drivers and monitors who had worked for Durham (ALJD 3:16-19), the ALJ failed to grasp that Respondent intentionally maintained continuity of operations. Vice President Marlaina Koller testified that it is important for the children, drivers and monitors to know each other because "The children that we work with, they don't deal well with change. And if you can keep, you know, a steady driver or monitor, or both, the children are better behaved for their time that they're on the vehicle." (Tr. 643). Koller went on to say that she specifically sought out applicants who were familiar with the children on the routes covered by the Dutchess County contract. (Tr. 643-644). Driver Janet Hajba testified that at the job fair she asked Marlaina Koller if she would be assigned to the same runs, students, and parents as at Durham and was told, "Oh, most definitely, you would keep your same run. The same monitor that you have, you would be keeping." (Tr. 346). Monitor Heidi Rodegerdts testified that at the job fair Marlaina Koller addressed a group of applicants, mainly or entirely from Durham, and stated, "if she does take us, we would get our old runs. The runs that we had at Durham, we would also have with her." (Tr. 431). Driver Lavanda Cave testified that at the job fair Marlaina Koller went around to the tables of applicants and said, "we could keep our runs and what not, we wouldn't, like, be yanked off our runs, whatever." (Tr. 537). In fact, Respondent assigned all three to the same run with the same children. When asked if the children recognized her, Hajba stated, "Oh, yes; definitely. You couldn't break the routine because they get very upset, you know. They're children that have come a long way, and, you know, they don't understand, you know, exactly where they're going or what they're doing; so they want the same routine," and

"[w]ell, you know, when they see another Driver, they start getting scared. If they see another monitor, they're scared. Normally the kids are just getting used to you. You put them into their car seat. They're strapping them into their car seat, so they don't like to see a change." (Tr. 338). Rodegerdts testified, "I like to get very close with my -- the children so they feel comfortable with me because they have disabilities and that; and they're scared, and I wanted to have a good relationship with the children." (Tr. 420). Such testimony demonstrates not only continuity existed but was deeply important.

Indeed, Respondent President Marlaina Koller admitted that she would keep drivers and monitors on the same runs they had at Durham if the run was available. Importantly, and ignored by the ALJ, Marlaina Koller also stated that the runs would *not* be available only if students moved, graduated, or left the program. (Tr. 649-650).

c. <u>The ALJ Erred in Analyzing the Importance of Familiarity with the Children (Exception 22)</u>

The ALJ failed to give proper weight to the business importance of the drivers and monitors being familiar with the children and parents. (ALJD 7:11-19). Vice President Marlaina Koller testified regarding the business importance of the drivers and monitors being familiar with the children and parents. The ALJ made no mention of this, and should have given it weight in making a determination regarding whether Respondent is a successor to Durham.

d. <u>The ALJ Erred in Her Findings Regarding Changed Working Conditions</u>

i. <u>The ALJ Erred in Weighing Testimony on How Often Employees Go to Base (Exception 14)</u>

The ALJ erroneously gave great weight to the testimony of some employee witnesses that they go to Respondent's base less frequently than they did to Durham's. (ALJD 5:34-35, 5:38-39 7:42-43, 7:45-46). While some employees may have reported less frequently, this was not true

for all and certainly did not constitute a change in working conditions sufficient to defeat a finding of substantial continuity under *Fall River Dyeing*. For example, although Janet Hajba testified that she went to Respondent's base less frequently, Sherry Siebert testified that, "most of the time," she would return back to Respondent's Dutchess County base after dropping off her children in the mornings, like she did at Durham. (Tr. 619).

ii. <u>The ALJ Erred In Finding that Monitors Use Specialized Equipment (Exception 23)</u>

Without specifying any particular equipment, the ALJ incorrectly made the conclusory finding that monitors for special needs children use specialized equipment. (ALJD 7:17). The ALJ makes no mention or indication regarding what "specialized equipment" she found. In any case, there is no evidence that any equipment used by Respondent's monitors differs from that used by monitors at Durham. Therefore, the ALJ erred in finding that monitors use "specialized equipment," and to the extent she placed any weight upon that finding in her analysis of whether Respondent is a legal successor to Durham, she did so in error.

iii. <u>The ALJ Incorrectly Found that Most Routes Changed (Exception 13)</u>

The ALJ incorrectly found that most of the routes changed after Respondent took over the Dutchess County contract, ignoring employee testimony and evidence to the contrary. (ALJD 5:26-27, 7:36). The ALJ failed to cite to any specific evidence supporting her conclusion that most of the routes changed. In fact, three of General Counsel's witnesses testified that their runs remained exactly the same and one witness, Lavanda Cave, testified that his run even had the same name: Dutchess 4. Another witness testified that she did not need to do a "dry run" of her route with Respondent because she already knew it—it was the same as her route with Durham. Vice President Marlaina Koller testified that routes change normally whenever children are

"added or deleted"[9] during the school year and between school years. (Tr. 649-650). Therefore, to the extent there were changes to employees' routes, those changes would have occurred at Durham too.

Additionally, Marlaina Koller testified that she would make an effort to accommodate requests by former Durham employees to keep their routes after being hired by Respondent. (Tr. 651). She testified that she obtained a list of the Durham routes and that, even if new employees of Respondent did not request their old routes, she would give them their old routes wherever possible. (Tr. 720). Therefore, the ALJ had no evidentiary basis for her conclusion that most of the routes changed after Respondent took over the Dutchess County contract; had she properly examined the record evidence, she would have found that most former Durham employees kept their same routes, with minimal changes.

Respondent will undoubtedly argue, as it did at trial, that most or all former Durham employees' routes changed when they began working for Respondent. However, Respondent failed to prove that at trial. Instead, Respondent introduced two sets of route sheets—an undated set obtained from Durham via subpoena duces tecum (RX-14) and its own set (RX-42). Respondent's subpoena duces tecum requested from Durham route sheets for January through June 2014, but Durham General Manager Mark Nusbaum testified that he does not know when the Durham route sheets given to Respondent were created; he only knew that they were certainly created before his hire date of August 20, 2014. (Tr. 770, 773-74). It is entirely possible that the Durham route sheets Respondent relied upon at trial were not the route sheets in effect when Respondent took over the Dutchess County contract, and there was no testimony to confirm when they were created, in use, or updated, if ever. Given Marlaina Koller's testimony that routes change continuously throughout the school year, due to students moving, graduating

[9] Marlaina Koller testified that this meant "Moving. Graduating. Not going to the program." (Tr. 650).

and disenrolling from programs, it is difficult to say what, if any, value one can place on undated route sheets about which Durham's own General Manager had virtually no knowledge.

General Counsel objected to the introduction of RX-14 on the basis that Nusbaum was incompetent to testify regarding the Durham route sheets because he admitted that he had never seen those route sheets before and had never used them during his tenure at Durham. (Tr. 774). The ALJ overruled the objection and admitted the documents anyway. Without additional necessary information regarding their creation and use, comparing Durham's route sheets to Respondent's is of little value in determining whether employees' routes changed after Respondent assumed the contract. Drivers' and monitors' testimony that their routes remained the same and Koller's testimony that she gave employees their Durham routes whenever possible constitutes reliable evidence on which to base a factual finding. Thus, the ALJ should have found that most former Durham employees kept the same routes when they began working for Respondent.

iv. <u>The ALJ Incorrectly Found that Hours Changed (Exception 28)</u>

The ALJ erroneously concluded that drivers and monitors have different work hours at Respondent than at Durham. (ALJD 7:39-40). Driver and monitor witnesses testified that they had the same runs, picked up the same children, and took them to the same schools. As Respondent took over the Dutchess County contract in the middle of the school year, it offered no evidence that the school day started or ended at changed times, and it is implausible that it would have. Having no evidentiary basis to do so, the ALJ should not have concluded that drivers and monitors have different hours at Respondent than at Durham.

v. The ALJ Erred in Finding that Durham had a Two Facility Unit (Exception 25)

The ALJ erred in her finding that, "[w]hile Durham had two sites, in Poughkeepsie and Red Hook, the Respondent opened a new facility in Wappingers Falls." (ALJD 7:24-25). The ALJ erred by referring to the unit at Durham as a two-facility unit, by suggesting that Durham was not always a single-facility unit, and by suggesting that Red Hook's relationship to Poughkeepsie is any way parallel to Dutchess County's relationship to Yonkers.

Durham's service contracts in Dutchess County were operated out of a facility at 710 Tucker Drive, Poughkeepsie which included garages, maintenance areas, offices, an employee break room, and a parking lot. (Tr. 223-224). Durham also rented an unpaved field on a farm in Red Hook where five to seven buses would be parked. (Tr. 224-225, 351). No work was performed there other than the act of parking a few buses. The ALJ erred in suggesting that Red Hook is a site independent of any other when it is hardly more than an empty field. Red Hook could never be considered a facility unto itself in terms of designing an appropriate bargaining unit. While Article 34 of the contract between the Union and Durham identifies the scope of the unit as including locations in both Poughkeepsie and Red Hook, it does not describe Red Hook as a facility as defined in Board law. (GCX-7, Tr. 224-225, 351). Analogously, Respondent leases a yard at 215 Lake Avenue, Yonkers where a few buses are parked. (Tr. 871-872). Yet no party asserted that this location constituted a separate appropriate bargaining unit unto itself.

vi. The ALJ Erred in Finding that Durham's Operations Continued Unchanged After It Lost the Contract (Exception 26)

The ALJ erred in finding that Durham's operations continued virtually unchanged at its Poughkeepsie and Red Hook sites after it lost the Dutchess County contract. (ALJD 7:29-31). For at least several years until April 2014, Durham serviced several school bus transportation contracts out of its Poughkeepsie facility, including Dutchess County Pre-School; Dutchess

County BOCES; Rhinebeck School District; Spackenkill School District; and Rondout School District. (Tr. 226). The Union's bargaining unit at Durham consisted of about 185 drivers and monitors among the various contracts. (Tr. 225). As of April 11, 2014, Durham had lost and ceased servicing the Dutchess County Pre-School contract, which had required about 80 drivers and monitors, because it had been awarded to Respondent. (Tr. 229, 232). This reduced the total size of the bargaining unit at Durham by about 80 members, a decrease of over 40-percent. (Tr. 229). Durham's operations at Poughkeepsie cannot be reasonably characterized as "virtually unchanged" when the company has just lost a contract that provided work for over 40-percent of the bargaining unit.

IV. DUTCHESS COUNTY IS AN APPROPRIATE SINGLE FACILITY UNIT (Exceptions 32, 40, 41, 44, 50, 51)

The ALJ erred in finding that Dutchess County is not a functioning stand-alone facility operating independently of Yonkers (ALJD 9:38-39, 13:5); that Dutchess County could not function without the daily oversight of Yonkers and lacks a separate identity (ALJD 9:41-42); and that Dutchess County has a community of interest with Yonkers, in that both operate under the same managers and supervisors, with the same company policies, benefits, and wage structure. (ALJD 12:17-19).

The ALJ erred in applying Board law on the burden of proof in overcoming the presumption that a single-facility unit is appropriate. Respondent maintained the Dutchess County facility and its employees separate from its other operations. As it had been a single-facility unit under Durham, the Dutchess County bargaining unit remains presumptively appropriate, even in a successorship context. *See Van Lear*, 336 NLRB at 1063; *Children's Hospital*, 312 NLRB 920, 928 (1993), enforced 87 F.3d 304 (9th Cir. 1995). To show that a single-facility unit is not appropriate, a successor employer must show that the unit has been

effectively merged into a larger group of employees. *See P.S. Elliott*, 300 NLRB 1161 (1990). The Board looks at such factors as central control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions, and working conditions; the degree of employee interchange; distance between locations; and bargaining history. *See J&L Plate, Inc.*, 310 NLRB 429 (1993); *D&L Transportation, Inc.*, 324 NLRB 160 (1997); *Hilander Foods*, 348 NLRB 1200 (2006). *See also Esco Corp.*, 298 NLRB 837, 839 (1990); *Temco Aircraft Corp.*, 121 NLRB 1085, 1088 (1958) ("[a] single plant unit is generally appropriate for collective bargaining purposes, unless such plant unit has been so effectively merged with another as to destroy its identity"). The party opposing the single-facility unit, in this case Respondent, has the "heavy burden of rebutting its presumptive appropriateness." *Trane*, 339 NLRB 866, 867 (2003). *See also J&L Plate, Inc., supra*. The totality of these factors shows that Wappingers Falls is an appropriate single-facility unit.

The situation is comparable to that in *Montauk Bus Company*, 324 NLRB 1128 (1997). In *Montauk*, a unionized predecessor bus company had provided transportation services to a school district on Long Island from 1992 to 1995. 324 NLRB at 1128-1129. In 1995, the school district put the contract up for bid and it was awarded to the successor. 324 NLRB at 1129. The Union demanded recognition and the successor argued that the predecessor's single terminal could not exist as a separate unit and that the only appropriate unit consisted of all its terminals and employees on Long Island, a total of four facilities. 324 NLRB at 1134-1135. There the Board found that a successorship relationship existed for a single facility unit by finding, "[e]ach terminal has its own dispatcher who is responsible for day-to-day operations," "very little interchange of busdrivers from one terminal to another," and that "the historical bargaining unit

governing the relationship between the Union and the predecessor companies, was a single location unit." 324 NLRB at 1135-1136.

There is evidence of significant local autonomy at the Dutchess County facility. Respondent has an onsite manager, Company President Judith Koller, and two local dispatchers, Aldo Leon and Carlos Rivera. The Dutchess County dispatchers had responsibility to arrange for coverage of runs, respond in the event of a bus accident, report late or tardy students to schools and parents as necessary, and deal with other issues as they arise. (Tr. 288, 308). The Dutchess County dispatchers are also responsible for assigning routes, reassigning routes when a driver is late or absent, time-off requests, and otherwise making sure the facility runs smoothly day-to-day. (GCX-10, 11). On at least one occasion the dispatchers, who had received reports that a driver was late or lost, was also given responsibility to terminate that driver, Sherry Siebert. (Tr. 607-608). That level of responsibility, along with the presence of a full-time onsite manager, is sufficient to demonstrate local autonomy. *See D&L Transportation*, 324 NLRB at 161 (holding terminal manager responsible for hiring, issuing minor discipline, and time-off requests, along with local dispatcher authorized to assign drivers to routes to cover absences, provided "evidence that individuals at this location are vested with significant autonomy over local terms and conditions of employment"). As discussed in detail below, the ALJ's finding that Wappingers Falls has no separate identity and is not an appropriate separate unit, is not supported by the record and is inconsistent with Board law given the local autonomy in Wappingers Falls, the Dutchess County's employees' history of collective bargaining, a history not shared with the Yonkers employees, the lack of centralization at Yonkers, the difference in wage rates, the absence of meaningful interchange, and the significant geographic separation between facilities.

a. <u>There is Local Autonomy In Dutchess County Because the President is Based There (Exceptions 1, 6, 8, 9, 39, 48)</u>

The ALJ erred in finding that the various managers from Yonkers are responsible for operations at Wappingers Falls; that all of the Respondent's managers are assigned to, and work from, the Yonkers facility; and that they only go to Wappingers Falls as needed, such as for weekly delivery of paychecks. (ALJD 4:11-12; 4:37-38).

Contrary to these findings, Driver Janet Hajba testified, "[i]f I go down there [Dutchess County facility] I'll go in and say hello to her [Judy Koller], you know; ask her how her day is." (Tr. 365-366). Dispatcher Carlos Rivera confirmed the statement in his affidavit that, "Company President, Judy Koller, who supervises the location [Wappingers Falls] and who is present three to four days a week." (GCX-11; Tr. 511). Aldo Leon testified in his affidavit that at, "Wappingers Falls other than drivers and monitors there are Carlos, myself and Judy Koller, who is the president, who is present about four days a week, or sometimes three days." (GCX-10). Marlaina Koller testified that in April and May of 2014, Judy Koller was in Dutchess County "from four to five days a week." (Tr. 796, 800). Mary Anne Coe testified that in April and May of 2014 she would see Judy Koller at Wappingers Falls "almost every day." (Tr. 983). Thus, if the President herself is there, why would Wappingers Falls be a satellite of Yonkers or unable to function if cut off? Conversely, although the President is in Wappingers Falls, there is no evidence that Yonkers is a satellite of Wappingers Falls. Rather, it appears that President Judy Koller runs Wappingers Falls while her daughter,Vice President Marlaina Koller, runs Yonkers. (Tr. 665, 684, 699).

b. <u>There is Local Autonomy at Dutchess County Because Local Dispatchers Leon and Rivera are Agents of Respondent (Exceptions 33, 39, 48)</u>

i. <u>The ALJ Erred by Ignoring Evidence that Leon and Rivera Are Agents (Exceptions 7, 8 , 9, 38)</u>

The ALJ erred in failing to find Aldo Leon and Carlos Rivera are agents of Respondent under Section 2(13) of the Act and that they did not perform autonomous tasks for the Dutchess County facility. (ALJD 9:16-17; 9:39-41; 9:16-17). Because the Consolidated Complaint does not allege that Leon and Rivera are supervisors under Section 2(11) of the Act (GCX-1(e), p. 3), the ALJ did not need to address this issue. Instead, she should have addressed the allegation that they were agents as the Consolidated Complaint alleges, but she failed to do so.

Leon and Rivera are Respondent's dispatchers for Dutchess County and work at the Wappingers Falls facility with President Judy Koller. (Tr. 538). They assign the drivers and monitors their runs "to make sure everything runs smoothly" at the Wappingers Falls facility. (GCX-10, Tr. 308). As part of their duties, Leon and Rivera communicate with parents and county officials, handle sick day requests, manage school delays, and emergency situations, including accidents. (Tr. 288). Employees consider the dispatchers their bosses. (Tr. 546, 604, 1013). Leon and Rivera hand out checks to employees on bi-weekly paydays at the Wappingers Falls location. (Tr. 293, 362). Yet, the ALJ incorrectly found that scheduling an available driver to monitor or cover for another driver is "not a managerial decision," and that distributing paychecks is "not a managerial function." (ALJD 9:24-25, 9:28). She failed to cite any law for these conclusions, and it is difficult to determine how much weight she gave them. What is clear, however, is that the ALJ ignored evidence that Leon and Rivera assign runs, manage emergency situations and delays, handle sick day requests, and communicate with parents and county officials in the Dutchess County area. Despite acknowledging some of their agency tasks, like distributing paychecks, the ALJ did not find that they have local autonomy or control of daily operations in Dutchess County. Looking at the totality of their responsibilities, it is clear that the dispatchers had local autonomy and control of daily operations. *See D&L Transportation*, 324

NLRB 160 (1997) (holding terminal manager responsible for hiring, issuing minor discipline, and time off requests, along with local dispatcher authorized to assign drivers to routes to cover absences, provided "evidence that individuals at this location are vested with significant autonomy over local terms and conditions of employment").

The ALJ also erred in finding that Respondent's employees report to Yonkers supervisors rather than Leon and Rivera. Employee testimony established that employees contact Leon or Rivera when they are running late, when they need to request time off or coverage for their runs, or when they encounter delays in their runs. Leon and Rivera coordinate all time off and run coverage on a blackboard located at the Wappingers Falls location. (Tr. 298, 357-362, 446). Employees notify Leon and Rivera, not Yonkers, when a child is absent or when a parent is not present to receive a child. (Tr. 444). Also, as discussed *infra*, Yonkers did not exercise day-to-day control over Dutchess County and the Dutchess County drivers and monitors are unfamiliar with Yonkers personnel and supervisors.

ii. <u>The ALJ Erred by Not Properly Evaluating the Testimony of Mary Ann Coe (Exception 35)</u>

The ALJ erred in failing to address and analyze the testimony (Tr. 1006-1016) and affidavit (GCX-19) of Respondent's witness Mary Anne Coe. The ALJ erred by not explaining why she does not address Coe's conflicting testimony and affidavit and why it was not included in the analysis of local autonomy at Dutchess County and the agency status of Leon and Rivera. If the ALJ had taken Coe's statements into consideration, such evidence would have weighed in favor of the General Counsel's case.

Coe is a driver for Respondent and a former driver for Durham. (Tr. 967). While at Durham in 2013, Coe filed a decertification petition against the Union, evincing her anti-union and pro-management sentiments. (RX-44, Tr. 991-992). Coe acknowledged meeting with

Respondent's Counsel in preparation for her testimony. (Tr. 1012). Coe's testimony contradicted her affidavit in which she made statements against Respondent's interest.

Coe acknowledged that she provided an affidavit to the Board in August 2014 and that she understood she was under oath when she provided it. (GCX-19; Tr. 1011-1012). The affidavit states in part, "Aldo [Rivera] is referred to by the employees as site supervisor," and Coe added on the record "[t]hat's what some of the employees call him." (GCX-19; Tr. 1013). Coe further testified by affidavit that, "[a]s far as I can tell these two [Leon and Rivera] run the operations on a day to day basis and make the assignments. All questions are directed to them by the employees," "Typically if I was needed [sic] time off I would speak to Carlos or Aldo and they would grant the permission," and "Carlos [Rivera] has fired a few monitors I believe." (GCX-19).

A factor in determining Section 2(13) agency status is how employees view the alleged agents and if employees see them as conduits to management and as communicating management's views and directives to employees. *See Victor's Cafe 52*, 321 NLRB 504, 504 n. 1 (1996) (holding restaurant maitre d' was employer's agent where employer placed maitre d' in position of conduit for communicating management's views and directives). Coe's affidavit identified several indicia that Leon and Rivera are agents of Respondent in the eyes of the drivers and monitors. The ALJ erred in not reconciling or analyzing Coe's conflicting descriptions of Leon and Rivera and erred again in not incorporating her affidavit testimony into any finding on agency status and local autonomy.

iii. The ALJ Erred by Not Properly Evaluating the Testimony of Respondent's Vice President Marlaina Koller (Exceptions 34, 36)

The ALJ erred in not properly evaluating the testimony of Respondent's Vice President Marlaina Koller regarding the agency status of dispatchers Leon and Rivera and hence local

autonomy at the Dutchess County facility. At hearing Marlaina Koller acknowledged having received a letter from the NLRB during the investigation of this matter, that the handwritten answers on the letter were hers, that the answers were correct, and that she had previously returned it to the NLRB. (Rejected GCX-15; Tr. 675-677, 687).[10] Certain of the positions Respondent takes in this position statement of late July 2014 conflict with positions taken by Respondent at hearing and are statements against interest. Thus, the ALJ erred in not identifying, analyzing, and reaching the determinations on them that weigh in favor of finding local autonomy.

Marlaina Koller acknowledged that in response to certain bullet-pointed questions on the letter she provided the following:

- A detailed explanation of the roles of dispatchers Aldo Leon and Carlos Rivera;
    - *Managers oversee daily ops, communicate with drivers and monitors* (Rejected GCX-15; Tr. 685-686, 688)

- A breakout of all managerial and supervisory personnel based in Wappingers Falls with their titles and their job duties;
    - *Carlos/Aldo – Judy K.* (Rejected GCX-15; Tr. 678-680).

In the question asking for a detailed explanation of the roles of dispatchers Leon and Rivera, Marlaina Koller referred to them as managers overseeing daily operations and did not merely repeat terminology from the question, but referred to them as 'managers' on her own. (Rejected GCX-15). In the question asking for "a breakout of all managerial and supervisory personnel based in Wappingers Falls," she named Leon and Rivera along with her mother Judy Koller, Respondent's President. Thus, in July 2014 Marlaina Koller's first instinct when questioned about operations in Wappingers Falls was to identify Leon and Rivera as being in

[10] At the hearing, the General Counsel attempted to introduce this letter marked as GCX-15, which is in the Rejected Exhibit file. The ALJ initially admitted the document (Tr. 683) then later reversed herself sua sponte. (Tr. 687). The document which contained admissions should have been admitted.

charge along with President Judy Koller, and not in the same category as the rank and file drivers and monitors. Marlaina Koller further testified to their agency status under Section 2(13) of the Act by stating, "Aldo and Carlos were hired to help us [President and Vice President] to communicate with the other drivers and monitors." (Tr. 680). Being a conduit for communication between supervisors and the bargaining unit is an indicia of Section 2(13) agency status. *Victor's Cafe 52*, 321 NLRB at 504 n. 1.

Marlaina Koller admitted that she completed the document in her attorney's office with his assistance. (Tr. 682-683). Many Board cases have found attorney statements, both in and out of court, to be admissions. For example, it is well-established Board law that a lawyer's position letter can be received as an admission if it contains a statement or statements conflicting with the party's position. *See*, e.g., *Raley's*, 348 NLRB 382, 501–502 (2006); *McKenzie Engineering Co.*, 326 NLRB 473, 485 n. 6 (1998); *Hogan Masonry*, 314 NLRB 332, 333 n. 1 (1994); *Massillon Community Hospital*, 282 NLRB 675 n. 5 (1987); s*ee also United Technologies Corp.*, 310 NLRB 1126, 1127 n. 1 (1993) (position letter attached to an unsuccessful motion to dismiss the complaint), enfd. mem. 29 F.3d 621 (2d Cir. 1994). Indeed, it is reversible error for the judge to refuse to admit into evidence such a position paper. *Massillon Community Hospital*, above; *Florida Steel Co.*, 235 NLRB 1010, 1011-1012 (1978); *Ablon Poultry & Egg Co.*, 134 NLRB 827 n. 1 (1961).

iv. <u>The ALJ Erred by Not Considering Who Terminated Sherry Siebert (Exception 16)</u>

The ALJ failed to discuss or analyze the evidence that it was the dispatchers, Leon and Rivera, who terminated Sherry Siebert. (ALJD 6:3, 9:31-32, 9:17-18, 9:39-41, 11:5-6). Such action on their part reveals their status as agents of Respondent and hence the local autonomy of Dutchess County. The ALJ appears to have accepted only the dispatchers' own testimony

regarding their job duties, such as whether they are involved in firing or granting time off, while ignoring the contrary testimony of Siebert and the dispatchers themselves in their affidavits. (GCX-10, 11). Sherry Siebert testified that Rivera and Leon effectively terminated her employment, while Leon and Rivera testified that they did not. (Tr. 608-609). Instead of weighing the evidence, the ALJ made a conclusory finding without supporting evidence that Leon and Rivera "do not…fire [employees]." (ALJD 9:18).

c. <u>The ALJ failed to Weigh the Compelling Factor of Bargaining History (Exception 49)</u>

The ALJ erred in analyzing the bargaining history by finding that, "there is no bargaining history at Allways East, as the Company has always been nonunion." (ALJD 13:2-3). While this statement is true, it misstates the standard for weighing bargaining history as an important factor for overcoming the presumption that a single-facility unit is appropriate. Respondent has never had a union and has no bargaining history and neither the General Counsel nor Respondent claim otherwise. The ALJ incorrectly looks to Respondent's Yonkers facility for the existence of any bargaining history, rather than Durham's Poughkeepsie facility as required by Board law.

As a single-facility, Respondent's Wappingers Falls location is presumptively an appropriate bargaining unit. *See Van Lear Equip.*, 336 NLRB 1059, 1063 (2001); *Children's Hosp*, 312 NLRB 920, 928 (1993), enfd. 87 F.3d 304 (9th Cir. 1995); *Montauk*, 324 NLRB 1128. In determining whether this presumption of appropriateness is rebutted the Board looks to community of interest factors between the facility in question and the facility or facilities it would potentially be merged with. The bargaining history of a facility is a community of interest factor, along with central control over daily operations and labor relations; the extent of local autonomy; the degree of employee interchange; similarity of skills, functions, and working

conditions; and distance between the locations. *See J&L Plate, Inc.*, 310 NLRB 429 (1993); *D&L Transportation, Inc.*, 324 NLRB 160 (1997); *Esco Corp*., 298 NLRB 837 (1990).

Under Board law, bargaining history is the community of interest factor given the greatest weight. The Board has stated that, in evaluating whether the unit has been merged or is appropriate as a separate facility, "the most compelling factor…is the history of collective bargaining for the unit." *Radio Station KOMO-AM*, 324 NLRB 256, 262 (1997). *See also Children's Hospital*, *supra*. Bargaining history "alone suggests the appropriateness of a separate bargaining unit, and compelling circumstances are required to overcome the significance of bargaining history." *Radio Station KOMO-AM*, 324 NLRB at 262, citing *Armco, Inc. v. NLRB*, 832 F.2d 357, 363 (6th Cir. 1987); *Children's Hospital*, 312 NLRB at 929; *Gibbs & Cox, Inc.*, 280 NLRB 953, 954 (1986); *Marion Power Shovel Co.*, 230 NLRB 576, 579 (1977). Here, the ALJ found that "Durham and the Union entered into collective-bargaining agreements, the most recent of which was effective from September 2, 2012, to August 31, 2018," (ALJD 4:21-22), but then failed to take the requisite next step of weighing that history as a compelling factor in finding a single-facility unit. At the time Respondent took over the bus routes in April 2014, the Union was 18-months into a 6-year collective-bargaining agreement with Durham. (GCX-7, Tr. 221-222). This was at least the second such collective-bargaining agreement between the Union and Durham. (GCX-7, Tr. 242-243).

In considering the history of collective bargaining for the unit, it does not matter whether collective bargaining with the predecessor employer was in a single or multi-facility unit; the Board has found a successor bargaining obligation where two facilities, previously represented in one multi-location bargaining unit, were sold to separate entities. *See Esco Corp.*, 298 NLRB at 839; *Mayfield Holiday Inn*, 335 NLRB 38 (2001), *enforced* 333 F.3d 646 (6th Cir. 2003) (multi-

facility unit divided into two separate and appropriate units upon sale to different owners, both of which were found to have a successor bargaining obligation with the incumbent union). The bargaining history in this case is a strong indicator of the appropriateness of the Dutchess County unit. The Union was certified as the collective-bargaining representative of these employees in October 2008 and had negotiated two collective-bargaining agreements prior to Respondent's takeover, one of which was in effect at the time of the transition.

The ALJ has diminished and misapplied the most important factor, the collective-bargaining history of the Dutchess County employees. Where, as here, there is a history of meaningful collective-bargaining with the incumbent union, the traditional factors used to rebut the single-facility presumption are of "lesser cogency." *Children's Hospital*, 312 NLRB at 929. Yet the ALJ gave no weight to the fact that the Dutchess County employees, unlike the Yonkers employees, have enjoyed representation and collective bargaining by the Union for years. Contrary to the ALJ's suggestion, the fact that only a subset of Durham's original union represented operation was taken over by Respondent does not weigh against the bargaining history and does not defeat a successorship finding. *See Mayfield Holiday Inn*, *supra* (no diminution of the weight given to the bargaining history even though multi-location unit was divided after sale to separate owners). The ALJ's failure to properly consider the bargaining history at Wappingers Falls is squarely contrary to case law.

The ALJ's acceptance of Respondent's argument that bargaining history does not support an appropriate unit at the Dutchess County facility because the Durham unit was a multilocation unit and Durham is still in business is unavailing. The Board has recognized that a bargaining unit is not rendered inappropriate merely because it was severed from a larger, multilocation unit. *See Nazareth Regional High School*, 283 NLRB 763 (1987) (unit reduced from nine schools

to one); *Mayfield Holiday Inn*, 335 NLRB 38 (2001), enforced 333 F.3d 646 (6th Cir. 2003) (multi-facility unit divided into two separate and appropriate units upon sale to different owners, both of which were found to have a successor bargaining obligation with the incumbent union); *Lincoln Park Zoological Society*, 322 NLRB 263, 265 (1996), enforced 116 F.3d 216 (7th Cir. 1997) (unit reduced from a district-wide unit of 2500 employees working at 100 locations to a single-facility unit of about 80 employees); *Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO-CLC v. NLRB*, 604 F.2d 689, 695-96 (D.C. Cir. 1979) (unit reduced to five plants from larger multiplant unit). Thus, that Respondent took over only part of Durham's ongoing operations does not defeat its successor bargaining obligation. Second, addressed *infra*, there is insufficient interchange between Respondent's Yonkers and Dutchess County facilities to "destroy" the identity of the former Durham unit. *See Temco Aircraft Corp.*, 121 NLRB 1085, 1088 (1958). Moreover, as noted above, the bargaining history was in a single facility unit.

d. <u>The ALJ Erred in Analyzing Interchange Between the Two Facilities (Exceptions 5, 41, 42, 47)</u>

The ALJ erred in her analysis of interchange between Respondent's facility at 228 Myers Corners Road in Wappingers Falls and Respondent's facility at 870 Nepperhan Avenue in Yonkers. She erred in finding *significant* interchange of employees initially and that numerous Yonkers drivers and monitors temporarily worked the new Dutchess County routes, either shuttling daily between the two facilities or staying at a Poughkeepsie area hotel. (ALJD 3:34-36, 11:37, 12:26-29). She also erred in finding that some Yonkers drivers and monitors preferred to stay at a local hotel while temporarily working on the Dutchess County routes. (ALJD 3:36-38).

At no point has there been meaningful interchange between the employees of the two distant facilities. Respondent conceded that only 5 to 10 Yonkers employees were shuttled daily to Dutchess County during the *initial startup period* to cover for people who called in sick. (Tr.

765, 766, 767, 834). This practice ceased by September after the 2014-2015 school year began. (Tr. 767-768). No evidence exists that these Yonkers employees performed a meaningful percentage of Dutchess County routes during this time.

In *New Britain Transportation Co.*, 330 NLRB 397 (1999), the employer argued that significant interchange occurred among its facilities to rebut the single facility presumption, providing evidence of more than 200 instances of temporary employee interchange during a 5 month period. *Id.* at 398. The Board stated that the employer's proffer of evidence "lack[ed] any context and, thus, [was] of little evidentiary value because the Employer did not present evidence on the percentage of the total number of routes and charters involving temporary interchange or the percentage of the total employees involved in temporary interchange." *Id*. Therefore, the Board held that the ALJ erred in relying on the employer's evidence in finding significant interchange.In other cases, the Board has also held that evidence of limited interchange during a startup or busy period is insufficient to disturb the single facility presumption. *See Heritage Park Health Care Center*, 324 NLRB 447, 451-52 (1997), enforced 159 F.3d 1346 (2d Cir. 1998) (unpublished table decision) (temporary transfers during 6-month transition period due to shortage of employees was insufficient to establish significant interchange); s*ee also Macy's, Inc.*, 361 NLRB No. 4, slip op. at 10 (2014) (temporary instances of assistance to other departments with inventory procedures not considered significant interchange in appropriate unit determination).

Thus, under Board law, the ALJ in this case erred in relying on the employer's evidence of interchange. Respondent's evidence provided no indication about the number of Dutchess County runs actually covered by Yonkers employees nor whether any Dutchess County employees have been temporarily assigned to Yonkers facility runs. Indeed, the evidence shows

thatthe facilities engaged in a time-limited, one-way shift of a few employees from Yonkers to Dutchess County. Respondent asserted that it shuttles Dutchess County employees to Yonkers as the need arises. (GCX-10). This speculation is of no probative value. *See Montauk,* 324 NLRB at 1135 ("[A]lthough the Company advises its drivers that it has the right to assign them wherever it wants, the fact is that most drivers stick to the terminals and routes to which they are assigned."). Thus, the ALJ, contrary to precedent, gave unwarranted weight to the brief, one-way assignment of a few Yonkers employees to Dutchess County and found, but failed to analyze, the fact that no Dutchess County employees have ever been sent to Yonkers to perform Yonkers work. (ALJD 12:29-30).

Respondent's arguments to the contrary are meritless under Board law. Respondent maintains that Leon and Rivera were permanently transferred to Dutchess County, (Tr. 699, 920-922, 941-943),but evidence of permanent transfers is of less significance in determining the level of employee interchange than evidence of temporary transfers. *See Macy's,* 361 NLRB at 10 ("Nine permanent transfers over a 2-year period do not establish significant interchange"); *J&L Plate,* 310 NLRB at 430 (21 permanent transfers over a 3-4 year period considered "insubstantial" in number and "of less weight than evidence regarding temporary transfers").

In fact, that Respondent permanently transferred Yonkers employees to Dutchess County, rather than temporarily assigning them there, indicates the two facilities function as separate enterprises. *See Dean Trans., Inc.*, 350 NLRB 48, 59 (2007), enforced 551 F.3d 1055 (D.C. Cir. 2009) ("[T]emporary interchange is more important than permanent interchange because it shows the degree to which there has been a merger of the two groups of employees.") (citing *Frontier Tele. of Rochester, Inc.*, 344 NLRB 1270 (2005), enforced 181 F. App'x 85 (2d Cir. 2006)). This evidence of very limited, one-way employee exchange, establishes that the

Dutchess County facility remains an appropriate bargaining unit and is entirely insufficient to meet Respondent's heavy burden to rebut the single-facility presumption. *See New Britain Transportation Co.*, 330 NLRB 397, 398 (1999) (evidence of 200 instances of temporary employee interchange in five months lacked evidentiary value because it failed to demonstrate "the percentage of the total number of routes and charters involving temporary interchange or the percentage of employees involved in temporary interchange"); *Montauk Bus Co.*, 324 NLRB at 1135 (shuttling drivers between terminals on an ad hoc basis to cover illnesses or other circumstances not tantamount to significant employee interchange; single-facility presumption not rebutted); s*ee also Marine Spill Response Corp.*, 348 NLRB 1282, 1287 (2006) (the occasional temporary assignment of employees at one facility to a different one not considered "a regular and substantial part of the day-to-day functions" of the reassigned employees; insufficient interchange to create the loss of separate identity necessary to rebut the single-facility presumption).

In *Dattco* 338 NLRB 49 (2002), for example, more limited local autonomy existed than in this case. Unlike here, in *Dattco*, terminal managers did not handle time off requests, handle route assignments and monitoring, or issue discipline or terminations. And, the Board found key evidence of daily interchange between terminals involving nearly one-third of its drivers, which supported its single facility presumption. Those factors are not present here. The instant case can be distinguished from *Prince Telecom*, 347 NLRB 789 (2006) (single-facility presumption was rebutted; technicians did not belong in the same unit where they were dispatched from single facility to work on geographically distinct telecom systems); *Budget Rent A Car Sys.*, 337 NLRB 884 (2002) (no separate local management; functional integration and employee contact across stores); *Marine Spill Resp. Corp.*, supra (ongoing employee interchange; employees attended

combined daily work assignment meeting); *R & D Trucking*, 327 NLRB 531 (1999) (frequent employee interchange; lack of local autonomy); *Novato Disposal Servs.*, 328 NLRB 820 (1999) (significant employee interchange; common supervision); *Dayton Trans. Corp.*, 270 NLRB 1114 (1984) (frequent employee interchange); *Big Y Foods, Inc.*, 238 NLRB 860 (1978) (limited local autonomy; employee interchange); *Waste Mgmt. Northwest*, 331 NLRB 309 (2000) (lack of local autonomy; functional integration of the employer's operations; evidence of interaction and coordination between the two groups of employees); *Trane*, 339 NLRB 866 (2003) (centralized control over daily operations; employee interchange). This case is analogous to *Dean Transportation, Inc.*, 350 NLRB 48 (2007), enforced 551 F.3d 1055 (D.C. Cir. 2009) and *Montauk Bus, Co.*, *supra*, in which the single-facility presumption was not rebutted. As in both *Dean* and *Montauk*, the evidence shows that the Dutchess County facility had local autonomy over day-to-day operations, including reassigning routes as needed.

The ALJ also erroneously found that certain employees preferred to stay in a hotel rather than be shuttled between Yonkers and Dutchess County. (ALJD 3:36-38). The record provides no support for any finding on who stayed in a hotel in Dutchess or why they stayed there. The ALJ's unsupported finding that these unknown and unnamed individuals *preferred* to stay in a hotel indicates they had a choice to be shuttled back and forth or stay overnight. The record however is devoid of any evidence on whether they had any choice in the matter. Respondent introduced a series of bills for a hotel in Dutchess County for late April 2014 and Respondent presumably intended this to be evidence of interchange by drivers and monitors. (RX-24). However, the record never identified if the guests who stayed at the hotel were drivers and monitors or Respondent's supervisors from Yonkers, the latter of which would not be evidence of interchange.

e. <u>The ALJ Places Too Much Weight on the Centralization of Operations (Exceptions 9, 11, 43, 45, 46)</u>

The ALJ failed to analyze whether supervisors from Yonkers supervise Dutchess County through the eyes of the bargaining-unit employees as required by *Fall River Dyeing*, 482 U.S. 27 (1987). Several employees testified that they do not know the names of the supervisors in Yonkers other than Vice President Marlaina Koller, and are not even sure if there are other supervisors at Yonkers. Employees also testified that they had never been to the Yonkers location, that they had never been expected to go there, and that they had never called there in the course of their duties. In fact, they did not know the telephone number for Yonkers or where to find it.

Driver Janet Hajba testified she had never been to Yonkers and when asked if she was ever told she might be assigned to drive there said, "No. I wouldn't go down there." (Tr. 352). When asked if she knew the names of any dispatchers in Yonkers, Hajba testified 'no.' (Tr. 363). When asked if she had ever been to Yonkers or told that she might have to work there Monitor Heidi Rodegerdts testified 'no.' (Tr. 434). Rodegerdts testified that she did not know any of the dispatchers in Yonkers and that she had called there only during the hiring process. (Tr. 448). Driver Lavanda Cave testified that he had never been to Yonkers and had never been told that he might have to go there. (Tr. 539). Cave testified that he did not know whether there were dispatchers in Yonkers. (Tr. 551-552). Cave testified that he had never heard of Respondent's Office Manager ToniAnne Francisco, who is based in Yonkers, and he had no idea who she was. (Tr. 570-571, 936-937). He also testified he did not know any of the individuals who worked at Yonkers, except one person "Freddie [Salazar]" who did some maintenance. (Tr. 571, 834). Cave has no regular contact with Yonkers, did not have the telephone number of any individuals there,

and had to look up the main number on the sole occasion he did need to contact Yonkers. (Tr. 579-580).

The level of centralized control also fails to rebut the presumption that the Dutchess County employees remain an appropriate separate unit. The degree of local autonomy demonstrated in the record outweighs any centralization. The ALJ found that Respondent has centralized policies and procedures, control over hiring, firing, discipline, wages and benefits, and maintains its payroll and accounting functions at its Yonkers location. But such centralization is insufficient to defeat the single facility presumption, especially where, as here, there is local autonomy. In other cases where the Board found that a separate unit remained appropriate, it discounted evidence that "decisions regarding policies, procedures, and labor relations [are] being made at the [employer's] headquarters," where there was also evidence that "local site supervisors at each location … carry out these policies and are responsible for ensuring that the drivers and employees at their location satisfy [the employer's] contractual obligations to the respective school districts." *Dean Trans., Inc.*, 350 NLRB at 58; *see also Van Lear*, supra (centralization of personnel policies and regulations, hiring and screening process for job applicants, and training for new hires was not, without more, enough to defeat the single facility presumption); *D&L Trans.*, 324 NLRB at 161 ("The existence of centralized administration and control of some labor relations policies and procedures is not inconsistent with a finding. . .that there exists sufficient local autonomy to support the single location presumption").

As discussed above, Respondent has an onsite manager and local dispatchers at the Dutchess County facility who independently make decisions involving the Dutchess County employees, including assigning routes, ensuring adequate coverage, handling time-off requests,

dealing with accidents, and, at least once, terminating an employee. This is sufficient local autonomy to sustain the single facility presumption. *See Montauk,* 324 NLRB at 1135 (finding "substantial" local autonomy where facility had dispatcher responsible for day-to-day operations whose duties included scheduling and rescheduling runs and rearranging assignments as needed); *Dean Trans.*, 350 NLRB at 58 (finding local autonomy where facility had site supervisor responsible for day-to-day operations including assignment and reassignment of drivers, fielding complaints from parents and schools, and general responsibility to make sure all routes were covered). Local autonomy is present even where the employee charged with maintaining order at the employer's facility is not a supervisor. *See Esco*, 298 NLRB at 840 (finding local autonomy where the employee in charge was not a statutory supervisor and there was no onsite manager). Thus, ample evidence in the record establishes that the Dutchess County facility has sufficient autonomy to support the single facility presumption.

The ALJ's overreliance on *Dattco* to conclude that the presumption was rebutted is misplaced. (ALJD 10:1-2). In *Dattco,* the Board found that the single facility presumption had been rebutted based on the employer's highly centralized control over daily operations, uniform working conditions, functions and skills, a lack of local autonomy, and significant, daily interchange of employees. *Dattco,* 338 NLRB at 51. Terminal managers had limited authority and were not responsible even for granting time off. *Id.* at 50. Likewise, district managers based at the employer's headquarters handled route assignment and monitoring. *Id.* Only headquarters personnel were authorized to issue written warnings, suspensions, or terminations to employees. *Id.* And, perhaps most importantly, the employer shuttled nearly one-third of the drivers to other terminals daily and supervised those drivers at the receiving terminals. *Id.* at 50, 51. These factors showing a centralized operation in *Dattco* stand in sharp contrast to the Dutchess County

operation, which has a full-time manager, who, as the company president, has significant authority, and two local dispatchers to assist in monitoring the day-to-day operations. Additionally, unlike in *Dattco*, this case involves limited evidence of interchange.

The ALJ's rejection of the General Counsel's comparison to *Dean Transportation*, supra, was also erroneous. The ALJ opined that in *Dean Transportation* there was virtually no interchange of employees and some local autonomy such as mechanics, route planners, and supervisors, as opposed to the situation here. (ALJD 11:20-23). In fact, the Dutchess County facility possesses a comparable degree of local autonomy regarding day-to-day operations, including assigning and reassigning routes as necessary. *Dean Trans.*, 350 NLRB at 58. Importantly, after Respondent's startup period, no evidence of continued employee interchange exists, in contrast to two instances of employee interchange in *Dean Transportation*, which were found too minimal to destroy the separate identity of the bargaining unit there. While the Dutchess County employees may possess similar job skills to their counterparts in Yonkers, a fact not dispositive of unit appropriateness, they labor under different working conditions, with Yonkers employees earning more than their counterparts in Dutchess County. Thus, the General Counsel's comparison of the instant case to *Dean Transportation* was appropriate for the same reasons the Board identified when it distinguished *Dattco* in its *Dean Transportation* analysis. Because *Dattco* involved daily and significant employee interchange, it is distinguishable both from *Dean Transpotation* and the case at issue here.

The level of interchange in *Dattco* was greater than even during the start up period here, at which point only around 10 of Respondent's approximately 200 drivers temporarily shuttled from Yonkers to Dutchess County. *Montauk*, supra, is also more analogous to this case than *Dattco*. In *Montauk*, the employer took over a contract to provide school bus transportation

services from the predecessor employer, who had an established collective-bargaining relationship with the union. *Montauk*, 324 NLRB at 1135. The employer argued that, because of the centralization of its operations, the only appropriate unit consisted of employees at all its area terminals, which would make the predecessor's employees a minority of the prospective unit. *Id.* The Board disagreed, concluding that local autonomy, limited employee interchange, geographic separation of the facilities, and bargaining history outweighed any centralization. *Id.* at 1128, 1135. Specifically, like here, the terminal had a local dispatcher who was responsible for assigning and reassigning routes as needed and generally overseeing daily operations. *Id.* at 1135. The Board deemed insubstantial the limited interchange of drivers to cover illnesses or other absences. *Id.* The 20 mile separation between the facilities was even less than the 56 miles that separate Respondent's Yonkers and Dutchess County facilities. And, importantly, as here, the facility had an established bargaining history. *Id.* These factors weighed heavily in the Board's conclusion that a single unit was appropriate despite evidence of centralization. Here too, these factors provide ample support for the General Counsel's argument that the Dutchess County employees constitute an appropriate unit. For the ALJ to decide otherwise was clear error.

The ALJ erred in several additional findings that lack record support. In finding that 19a training for state safety certificationwas conducted jointly at Yonkers, (ALJD 5:15-16), she fails to note that the training occurred at Palisade Preparatory School in Yonkers rather than at Respondent's facility. (Tr. 832). Thus, the Dutchess County bargaining unit did not visit the Yonkers facility even for these infrequent trainings. Likewise, in finding that Respondent applied a single wage structure to both Dutchess County and Yonkers, (ALJD 12:19), the ALJ missed key differences. As of April 2014, drivers at Yonkers were paid $16.00 to $19.00 and monitors

$14.00 to $16.00 per hour, (Tr. 632-633),whereas drivers in Dutchess County were paid $14.00 to $16.00 monitors $10.00 to $12.00 per hour, substantially less. (GCX-17).

Given the Dutchess County employees' history of collective-bargaining, a history not shared with Yonkers employees, the geographic separation between facilities, the difference in wage rates, and the lack of continuing or meaningful interchange, the Dutchess County unit is an appropriate unit.

f. The ALJ Wrongly States the Distance between the Two Facilities (Exception 37)

The distance between facilities is a factor in determining if they could be an appropriate unit. *J&L Plate, Inc.*, 310 NLRB 429 (1993); *D&L Trans., Inc.* 324 NLRB 160 (1997). Yet the ALJ erred in finding that the Wappingers Falls facility is 54 miles from headquarters in Yonkers and usually a 45-minute drive. (ALJD 9:13-14, 12:46-47). At the hearing, the ALJ took only judicial notice of the time and distance between facilities. (Tr. 539-540). However, upon information and belief, the drive from Respondent's 870 Nepperhan Avenue, Yonkers facility to Respondent's 220 Meyers Corners Road, Wappingers Falls location is minimally 56 miles, not 54 miles, and requires a driving time of minimally 65 minutes, not 45 minutes. The Board has found facilities closer in proximity to be sufficiently separated by distance to support the presumption that a single facility constitutes an appropriate unit for collective bargaining. *See Van Lear Equipment, Inc.*, supra (25 mile separation); *Montauk Bus Co., supra* (20 mile separation).

V. RESPONDENT HAD AN OBLIGATION TO BARGAIN WITH THE UNION (Exceptions 52, 53)

As successor to Durham, Respondent was required to bargain with the Union over terms and conditions of employment. The ALJ therefore erred in finding that Respondent had no obligation to bargain with the Union over of the termination of Sherry Siebert, no obligation to

respond to the Union's information requests, and did not unlawfully unilaterally change employees' wage rates. (ALJD 13:13-17).

a. <u>The ALJ Erred in Failing to Find that Sherry Siebert was Unlawfully Terminated and that she is Entitled to Search-for-Work Expenses (Exceptions 17, 53, 54, 56)</u>

Under Section 8(a)(5) of the Act, an employer may not refuse to bargain with respect to mandatory subjects of bargaining. *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 209-210 (1964). Termination of employment is a mandatory subject of bargaining. *N.K. Parker Trans., Inc.*, 332 NLRB 547, 551 (2000). The Board's decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), mandates that employers provide the union with notice and opportunity to bargain before unilaterally imposing serious discipline, including termination, which involves an exercise of employer discretion on a unit member during the period even before the parties have agreed upon a first contract. Respondent's termination of Siebert was an exercise of employer discretion as Respondent acknowledged it has other forms of discipline short of termination. (GCX-14, p. 8; Tr. 673-674). Therefore, the termination of Siebert violates Section 8(a)(1) and (5) of the Act. Although *Alan Ritchey* was struck down in *NLRB v. Noel Canning*, 573 U.S. 134, 134 S.Ct. 2550 (June 26, 2014) because it was issued by a quorum not properly constituted, *Alan Ritchey* was soundly reasoned and the ALJ should adhere to its rationale.

Siebert is also entitled to any search-for-work expenses she has incurred. Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment; the cost of tools or uniforms required by an interim employer; room and board when seeking employment and/or working away from home;

contractually required union dues and/or initiation fees, if not previously required while working for respondent; and/or the cost of moving if required to assume interim employment. See *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007); *Cibao Meat Prods. & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965); *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976); *Rainbow Coaches*, 280 NLRB 166, 190 (1986); and *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This rule limits reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent"). *See also North Slope Mech.*, 286 NLRB 633, 641 n. 40 (1987). It also has the effect of precluding discriminatees from obtaining reimbursement for expenses if their job search is unsuccessful. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, receives no compensation for his/her full expenses. The rule thus punishes discriminatees who meet their statutory obligations to seek interim work, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses. *In Re Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment").

Aside from being inequitable, this rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941). *See also Pressroom Cleaners & Serv. Employees Int'l Union, Local 32bj,* 361 NLRB No. 57 at *2 (Sept. 30, 2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees wholebecause it excludes monies the discriminate would not have spent but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions, i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work. In recognition of such inequities, the Equal Employment Opportunity Commission and the United States Department of Labor do not take this approach. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. U.S. Dep 't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

These issues clearly warrant a change to the existing rule regarding search-for-work and work-related expenses. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole." *Don Chavas, LLC*, 361 NLRB No. 10 at *3 (Aug. 8, 2014). For employees truly to be made whole for their losses, the Board should hold that

employers must cover search-for-work and work-related expenses regardless of a discriminatee's interim earnings. The Board should require these expenses to be calculated separately from taxable net backpay and paid separately, in the payroll period when incurred, with daily compounded interest charged. *See Jackson Hosp. Corp.*, 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

b. The ALJ Erred in Failing to Find that Respondent Must Answer the Union's Information Requests (Exceptions 53, 54)

Respondent unlawfully failed to provide information the Union requested. Union Business Agent Polesel submitted a request for the names of any and all former Durham employees who had been terminated. (GCX-9(c)). Respondent failed to respond to that request. (Tr. 237). An employer has a well-settled duty to bargain collectively under Section 8(a)(5) of the Act, includinga duty to supply requested information that is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Central Soya Co.*, 288 NLRB 1402 (1988). Without such information, the Union would have no way of knowing which employees remained in the bargaining unit, which would prevent it from carrying out many of its duties and responsibilities. Therefore, Respondent's failure to provide the Union with the information it requested violates Section 8(a)(5) of the Act.

c. The ALJ Erred in Failing to Find that Respondent Unlawfully Changed Wage Rates (Exceptions 53, 55)

Respondent unilaterally changed the unit employees' wage rates. (Tr. 23, 26-27). A successor employer, like any other, violates Section 8(a)(5) by making unilateral changes to terms and conditions of employment that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Even when an employer has set certain initial terms, employees have an

ongoing obligation to bargain with a union over any subsequent changes in terms and conditions of employment. *301 Holdings, LLC,* 340 NLRB 366 (2003). Here, Respondent unilaterally changed wage rates for unit employees in violation of Section 8(a)(5). (Tr. 28, 284, 545-546, 561-562). Under Board law, absent any initial announcement of new terms and conditions of employment, a successor employer must maintain the status quo regardless of whether it adopts a predecessor's collective-bargaining agreement. *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202, 208 (2007). As Respondent failed to announce wage changes when it set initial terms, and then unilaterally changed wage rates, it violated Section 8(a)(5) of the Act.

VI. CONCLUSION

Counsel for the General Counsel respectfully requests that the ALJ's findings of fact, analysis, and conclusion should be reversed and modified as reflected by General Counsel's Exceptions, and that the recommended remedy and order be modified to include all the remedies sought by the General Counsel in the Consolidated Complaint, and any other remedies as deemed appropriate by the Board.

VII. PROPOSED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. International Brotherhood of Teamsters, Local 445, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers and monitors employed by the Employer at its 228 Myers Corners Road, Wappingers Falls, New York location; excluding office clerical employees, dispatchers, assistant dispatchers, safety trainers, mechanics, guards, and supervisors and professional employees as defined in the Act.

4. Since April 22, 2014, and at all times thereafter, Respondent has violated Section 8(a)(1) and (5) of the Act by failing to and refused to recognize and bargain collectively with

the Union as the exclusive collective bargaining representative of all employees in the above described unit.

5. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the wage rates paid to employees in the bargaining unit, without first providing the Union with timely notice and an opportunity to bargain with respect to this conduct and the effect of this conduct.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by discharging unit employee Sherry Siebert, without first providing the Union with timely notice and an opportunity to bargain over that discretionary action.

7. Since July 18, 2014, Respondent has failed and refused to provide requested information to the Union that is relevant and necessary to its role as bargaining representative.

8. The unfair labor practices of Respondent, found above, affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

VIII. PROPOSED ORDER

The Respondent, Allways East Transportation, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

    a. Discharging or imposing discretionary discipline on employees without first providing the Union with timely notice and an opportunity to bargain over those discretionary actions.

    b. Changing wage rate for unit employees, without providing the Union notice and an opportunity to bargain.

    c. Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit set forth below:

        > All full-time and regular part-time drivers and monitors employed by the Employer at its 228 Myers Corners Road, Wappingers Falls, New York location; excluding office clerical employees, dispatches, assistant dispatchers, safety trainers, mechanics, guards, and supervisors and professional employees as defined in the Act.

    d. Failing and refusing to provide information requested by the Union that is necessary and relevant to its role as the exclusive collective bargaining representative of the Unit employees.

    e. In any like or related manner interfering with, restraining or coercing Respondent's employees in the exercise of the rights guaranteed them by Section

7 of the Act.

2. Take the following affirmation action necessary to effectuate the policies of the Act:

   a. Recognize and, upon request, bargain with the Union as the exclusive representative of the employees in the unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

   b. Within 14 days from the date of the Board's Order, offer Sherry Siebert full reinstatement to her former job without prejudice to her seniority or any other rights or privileges she previously enjoyed.

   c. Make Sherry Siebert whole for any loss of earnings and other benefits suffered as a result of her termination, in the manner set forth in the remedy section of the decision.

   d. Provide the Union with the information it requested on July 18, 2015.

   e. If requested by the Union, rescind the wage increase that was implemented in April 2014 and bargain with it before implementing future wage increases for unit employees.

   f. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Sherry Siebert that this has been done and that the discharge will not be used against her in any way.

   g. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

   h. Within 14 days after service by the Region, post at its facility in Fishkill, New York copies of the attached notice marked "Appendix C". Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own

expense, a copy of the notice to all current employees and former employees employed by the Respondent since April 22, 2014.

i. Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IX. PROPOSED NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything which interferes with, restrains or coerces you with respect to these rights. More specifically,

Teamsters Local 445, Affiliated with International Brotherhood of Teamsters, is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

> All full-time and regular part-time drivers and monitors employed by the Employer at its 228 Myers Corners Road, Wappingers Falls, New York location; excluding office clerical employees, dispatches, assistant dispatchers, safety trainers, mechanics, guards, and supervisors and professional employees as defined in the Act.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its role as your collective bargaining representative.

WE WILL NOT discharge or impose other forms of discretionary discipline which has an immediate impact on the tenure, status, or earnings of our employees in the bargaining unit described below without first providing the Union with timely notice and an opportunity to bargain over those discretionary actions.

WE WILL NOT refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the above bargaining unit by making unilateral changes to wages, hours, and other terms and conditions of employment absent an overall good faith impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective-

bargaining representative of unit employees.

WE WILL, if requested by the Union, rescind any or all changes to wages for employees in the unit described above.

WE WILL, provide the Union with the information it requested on July 18, 2014.

WE WILL, within 14 days from the date of this Order, offer Sherry Siebert full reinstatement to her former job without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Sherry Siebert whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Sherry Siebert, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in anyway.

DATED at Albany, New York this 21st day of December, 2015.

Respectfully Submitted,

/s/ *John J. Grunert*
JOHN J. GRUNERT

/s/ *Charles M. Guzak*
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